BRIEF IN SUPPORT OF PETITION.

The Jurisdiction to Grant the Writs.

(a) *Jurisdiction to Review the Order of the Special Court.*

The jurisdiction to review the order of the Special Court is invoked under Section 745 of Chapter XV of the Chandler Act (11 U. S. C. A. Section 1245), which authorizes a review by this Court on certiorari within sixty days from the entry of any final order. On September 28, 1940, the Special Court denied petitioner's motion to vacate its order of August 8, 1940 (R. 12). The order was assailed on jurisdictional grounds (R. 3-5). The denial of such a motion constitutes a final order for review purposes (*Board of Sup'rs.* v. *Knickerbocker Ice Co.*, 80 F. (2d) 248, 250; *Mohawk Realty Corp.* v. *Wise Shoe Co.*, 111 F. (2d) 287, 289; *Burke* v. *Canfield*, 111 F. (2d) 526, 527).

(b) *Jurisdiction to Review Order of Fourth Circuit.*

The jurisdiction to review the order of the Fourth Circuit of November 12, 1940, is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 1938, 28 U. S. C. A. Section 47).

Opinions Rendered.

The opinion sustaining the Debtor's Plan was rendered October 9, 1939 (29 F. Supp. 608; certiorari denied, 309 U. S. 654).

The opinion construing the powers and duties of the Trustee under the $50,000,000 note issue was rendered August 3, 1940 (34 F. Supp. 154-161).

The opinion of the Fourth Circuit dismissing the appeal from the denial of petitioner's motion was rendered November 12, 1940, and is not yet reported (R. 17-24).

Statement of the Case.

The Plan of the Debtor to extend its obligations for a period of eight years and to change certain interest rates was approved by the Special Court of the Maryland District on November 8, 1939 (29 F. Supp. 608-630), and certiorari was denied by this Court (309 U. S. 654). Among other securities there was a $50,000,000 4½% note issue which was extended from August 1, 1939, for a five year period at 4% interest rate. Subsequent to the approval of the Plan, on May 16, 1939, the Trustee of the $50,000,000 note issue filed its petition seeking therein a construction of the terms of the Trust Indenture and of its powers and duties thereunder. It alleged, among other things: (1) That the Trustee was possessed of $38,000,000 of the Refunding and General Mortgage Bonds, Series E, $232,000 of Preferred Stock, $232,000 of Second Preferred Stock and $566,000 of Common Stock of the Reading Company, and that under the provisions of Section 2 of Article Five of the Indenture the dividends thereon were to be paid to The Baltimore and Ohio Railroad Company as long as there was no default and as long as the combined capital and surplus of the Reading Company was not less than $225,000,000; (2) that the Trustee collected during the default period while the adjustment proceedings were pending $1,412,000; (3) that under the provisions of the decree entered by the Special Court on the approval of the Plan it was authorized and directed to pay over all dividends to The Baltimore and Ohio Railroad Company under terms as provided in a Supplemental Indenture executed under the Plan, which Supplemental Indenture contains a similar provision with regard to the dividends as was inserted in the original Trust Deed; and (4) that while the book value of the Reading Company showed its capital and surplus to be $233,000,000, yet if its assets

were written off to the actual value the combined capital and surplus might be less than $225,000,000.

The petition also alleged that the Trustee had reason to believe that the noteholders may take the position that The Baltimore and Ohio Railroad Company was not entitled to receive the dividends because the capital and surplus of the Reading Company were less than $225,000,000 and because of the defaults which existed (although cured by the decree of the court) and as against this position it is required to construe the language of the Indenture which referred to a book value as distinct from an actual value. Among the relief prayed therein was for instructions to the Trustee with regard to the disposition of the dividends collected and for further relief as to the court may seem proper and that jurisdiction of the noteholders be acquired by a notice to be given by mail and by publication in a newspaper of general circulation.

The Special Court construed the terms of the Trust Indenture, the powers and duties of the Trustee thereunder, and determined that the book value, as distinct from the actual value, controlled the situation notwithstanding the fact that the stock which was carried on the books at $160 per share had a market value of $5.00 per share (34 F. Supp. 154, 161). The court directed by its order of August 8, 1940, that the dividends be paid over and that the Trustee continue to pay dividends to The Baltimore and Ohio Railroad Company (R. 2-3).

Petitioner, Harvard State Bank, filed its petition within thirty days from the entry of the order asking to vacate the order on the ground that the court lacked jurisdiction of the subject matter and of the parties (R. 3-5). The court held: (1) That the petition was not timely filed, treating the petition as a motion for a new trial under Rule 59b, and (2) that the motion should be denied on the merits (R. 12-13). An appeal was taken within the time allowed by

law to the Fourth Circuit and there the appeal was dismissed on November 12, 1940, on the ground that exclusive jurisdiction was vested in this court by certiorari (R. 24). The application here is for a Writ of Certiorari from the decision of the Special Court which became final by the denial of the motion on September 28, 1940, as well as from the decision of the Fourth Circuit rendered on November 12, 1940.

Errors Intended to be Urged for Reversal.

1. The jurisdiction of the three-judge Statutory Court was limited to the scope of the proceeding under the Railroad Adjustment Act. The subject matter of the construction of the powers and duties of the Trustee under the Trust Indenture was entirely foreign to the Plan, which was approved prior to the filing of the intervening petition, and the court erred in assuming jurisdiction.

2. The Statutory Court did not acquire jurisdiction of the parties by the notice and publication and it was its duty to grant the motion and to dismiss the proceedings for want of jurisdiction, and it erred in disallowing the motion.

3. The Special Court erred in treating the motion to vacate the order for want of jurisdiction as a motion for a new trial, and in applying Rule 59b to proceedings in Bankruptcy. It was also its duty to hold that a party aggrieved by an order entered without jurisdiction is not estopped by laches and may at any time move to expunge the void order.

4. The United States Circuit Court of Appeals erred in dismissing the appeal on the ground that the exclusive right of action was vested in this court by the discretionary Writ of Certiorari, and it was his duty to review the appeal taken as of right under the Chandler Act.

ARGUMENT.

I.

The Jurisdiction of the Statutory Court Was Limited to the Scope of the Proceedings under the Railroad Adjustment Act and the Subject Matter of the Construction of the Duties and Powers of the Trustee and the Provisions Contained in the Trust Deed Was Entirely Foreign to the Plan and to the Proceedings.

This was a statutory proceeding and the jurisdiction was *limited* by Sections 713 and 726 of Chapter XV (11 U. S. C. A. Section 205).

(a) *The construction of the powers of the Mortgage Trustee and of the provisions of the Trust Deed was not embraced in the Plan nor in the Petition under which the jurisdiction of the Statutory Court was invoked.*

The Plan sought to relieve the Debtor from the default to pay the interest at the rate of 4½%, from paying the $50,000,000 note issue on maturity, and to extend its payment for five years. The Debtor's petition did not ask for the construction of the powers and duties of the Trustee nor of the provisions of the Trust Deed. The only relief sought was the change in the interest rate and in the maturity (29 F. Supp. 608). The Railroad Adjustment Act conferred jurisdiction on the court after the Interstate Commerce Commission approved the plan and the acquisition of certain acceptances before the filing of the petition. The construction of the terms of the Trust Deed and the powers and duties of the Trustee and the right thereunder *was never submitted* to the Commission *nor was it ever submitted to the noteholders,* and their assent was not obtained thereto. The Court was therefore without jurisdiction of the subject matter presented by the intervening petition.

The Special Court, in passing on the jurisdictional question (34 F. Supp. 154) stated that its first impression was that it was without jurisdiction of the subject matter and the Trustee should litigate the questions presented by its petition "in a separate and independent proceeding". However, upon "subsequent consideration" it decided that jurisdiction existed because "the question presented is sufficiently incidentally related to" as "to justify its instructions to the Trustee as to its proper duty".

It based its justification on section 1215 which vested the court with jurisdiction to prevent "against any action which might be inconsistent with said plan" and that "it may fairly be said that the failure of the Trustee to pay over the dividends to the B. & O., if it is the duty of the Trustee to do so, may interfere with the effective execution of the plan." The fallacy is apparent. The Plan extended the maturity and changed the rate of interest. It prevented the Trustee from foreclosure or from taking any other action because of the non-payment of interest or principal. The Plan had no bearing on the question whether the Trustee should pay over the dividends to the B. & O. because of the decrease in the capital and surplus of the Reading Company. There was nothing in the Plan pertaining to this question. There was nothing in the petition which invoked the jurisdiction pertaining to this matter and there was nothing in the decree which affirmed the plan relating to this subject matter.

(b) *The Statutory Court had neither the actual nor the constructive possession of the collateral, and it was without jurisdiction to pass upon the disposition of the dividends.*

The collateral was *neither in the actual nor constructive possession of the Debtor.* It was in the possession of the Mortgage Trustee. The jurisdiction of the Statutory Court was not *any greater than the jurisdiction in ordinary bank-*

ruptcy which is without jurisdiction of assets not in its *actual* or *constructive* possession.

In *Re Whitney,* 113 F. (2d) 426, in a decision rendered July 15, 1940, the Court said:

> "The interest of the bankrupt in the trust which the trustee in bankruptcy Lorenz seeks to reach on behalf of the creditors is vested in law in the Fiduciary Trust Company as trustee of an express trust and that company is bound to resist his claims. We so held in the old case of In re Baudouine, 2 Cir., 101 F. 574. The interest of the beneficiary of a trust who becomes a bankrupt *is not treated as an ordinary chose in action and regarded as in the constructive possession of the bankruptcy court, but the trustee who holds the res on behalf of the bankrupt is classed as an adverse claimant.*" (Italics ours.)

The only exception to the rule is under Section 77B where the jurisdiction was *extended* (*In Re Prudence-Bonds Corporation,* 77 F. (2d) 328; *In Re Adolph Gobel, Inc.,* 80 F. (2d) 849). The jurisdiction under Chapter XV was *not extended but limited.* It is apparent, therefore, that the Special Court lacked jurisdiction of the subject matter.

(c) *The Statutory Court did not acquire jurisdiction of the subject matter by the intervening petition of the Mortgage Trustee which could not have originated the jurisdiction.*

Under Chapter XV the Mortgage Trustee could not have originated the jurisdiction and such jurisdiction could not be supplied by its intervening petition (*Cohn* v. *Cities Service Corp.,* 45 F. (2d) 687; *Pianta* v. *Reich Co.,* 77 F. (2d) 888).

(1) *An intervenor may not supply jurisdiction of a subject matter which was lacking in the original pleading and jurisdiction may not be enlarged by intervention.*

The original petition did not confer jurisdiction of the subject matter. An intervenor may not raise any new

issues and is bound by the pleadings, and *he may not enlarge the jurisdiction* (*Hairgrove* v. *City of Jacksonville*, 366 Ill. 163; *Chandler* v. *Brandljek*, 296 U. S. 53, 58). The Special Court *which had no jurisdiction to determine the issue under the Debtor's petition had no jurisdiction or power to hear the matter under the Trustee's intervening petition.*

(2) *There was no ambiguity in the terms of the decree and the jurisdiction invoked under color of judicial construction cannot be sustained.*

Even if the court could have acquired jurisdiction by the intervening petition there was no basis for the contention that it was necessary to construe the terms of the decree. *There was no ambiguity in the decree.* The decree only referred to the payment by the Trustee because of the waiver of the default by the extension under the Plan. *It did not direct anything about such payment under any of the other terms of the Trust Deed.* The claim that it was necessary to construe the terms of the decree was without foundation as there was no ambiguity in any of its provisions (*Chicago Title and Trust Co.* v. *Robin*, 361 Ill. 261; *Hoefeld* v. *Sixty-third Halsted Realty Co.*, 289 Ill. App. 305). The jurisdiction to construe the Trust belongs exclusively to equity courts and is not vested in a statutory court, if there was anything to construe.

II.

The Statutory Court Did Not Acquire Jurisdiction of the Parties as the Original Jurisdiction Was Limited to the Plan and to the Consents Acquired Thereunder.

The only jurisdiction of the parties which the Court acquired was for the hearing on the petition to confirm the Plan. The Court lacked jurisdiction of the parties under

the issues raised by the Trustee's petition. *The service of notice by mail cannot confer such jurisdiction.* The fact that notices were mailed and no one objected does not supply the jurisdiction of the person. *The doctrine of waiver or estoppel cannot be relied on to cure the jurisdictional defect.*

The Railroad Adjustment Act requires consents by the required creditors. Even if the court had obtained personal service on all creditors *it was powerless to enter the order without the production of the necessary consents.* No such consents were produced. None were ever obtained. The noteholders only consented to the extension of the maturity and the change in the interest rate. *They did not consent to the payment of the dividends out of the collateral if the Trustee had no right to pay it over because of the other provisions of the Trust Deed.* The powers and duties of a Trustee are to be strictly construed (*Chicago Title & Trust Co.* v. *Robin,* 361 Ill. 261), and the consents given to the Debtor should also be construed strictly against the Debtor which acquired them as Trustee for the noteholders. The means by which a person is brought into a court and subjected to its jurisdiction goes deeply into the substance of that person's right and courts have no power to legislate how to bring such a person into their jurisdiction no matter how equitable their action may be (*Danoff* v. *Larson,* 368 Ill. 519) and the notice by mail and publication was void.

III.

The Petition to Vacate the Order Entered Without Jurisdiction Was Timely Filed and an Order Entered Without Jurisdiction Cannot be Supported by the Defense of Estoppel or Laches.

The Special Court gave as a reason for the denial of the motion to vacate the ground that it was not filed within

the period of ten days as required for a motion for a new trial under Rule 59b. The Court overlooked that *this was not a petition for a new trial but a petition to expunge a void order.*

(a) *Rule 59b is inapplicable where the jurisdiction of the Federal Court is attacked.*

The statutory provision for the filing of a petition or motion for a new trial within ten days (Rule 59b) applies to a motion for a new trial by a party to the proceedings based upon error in the Record. The instant case, however, *was not in the nature of a proceeding for a new trial but to expunge a void order for want of jurisdiction.* A void order is subject to attack *at any stage* of the proceedings, and *no estoppel or laches will supply such jurisdiction.*

In Re Cadillac Brewing Co., 102 F. (2d) 369, C. C. A. 6, the court said:

> "The petition to set aside the order for want of jurisdiction did not come too late. Questions of Federal jurisdiction are for the consideration of the court at any stage of the proceedings, and courts of bankruptcy are always open and without terms. Wayne United Gas Co. *v.* Owens Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557).

The refusal of a court to vacate a decree for lack of jurisdiction cannot be predicated because of the lapse of a term and such a refusal is reviewable as of *right* (*Mohawk Realty Corp* v. *Wise Shoe Stores*, 111 F. (2d) 287, 289, C. C. A. 2), and decisions of the court were cited.

If it be true as held by the Fourth Circuit in the instant case (R. 21) that a decision of a three-judge court "is to be ranked" with that of a Circuit Court of Appeals, then the decision in the instant case that a motion to vacate an order for lack of jurisdiction was not "timely" filed is in direct

conflict with that of the Second and Sixth Circuits and the Writ should issue.

(b) *Rule 59b is inapplicable to Bankruptcy and the decision is in conflict with the decision of the Sixth Circuit.*

The decision of the three-judge court that the petition was not "timely" filed because it was not filed within the ten days period as required by Rule 59b is in conflict with the decision of the Sixth Circuit.

The Sixth Circuit held in *Dannel* v. *Wilson-Weesner-Wilkinson Co.*, 109 F. (2d) 364, that the contention that a Bankruptcy Court may not set aside its order "because of the lapse of time" was "wholly without merit" since it is now "universally accepted" that a Bankruptcy Court "is always open without regard to term". The Court cites as authority the decision here in *Wayne United Gas Co.* v. *Owens Illinois Glass Co.*, 300 U. S. 181. See also *In Re Day*, 22 F. Supp. (D. of Md.) 946, 949.

The effect of Rule 59b was not discussed but the cases were decided after the adoption of the rule and a construction of this rule as applied to Bankruptcy is of extreme importance to the bench and bar.

IV.

The Circuit Court of Appeals Had Jurisdiction to Pass on the Issues Involved by the Appeal Taken as of Right, and it Erred in Dismissing the Appeal.

Petitioner contends that notwithstanding the provision in the Railroad Adjustment Act authorizing a *discretionary* review by this Court it had the *right* of appeal under the Bankruptcy Act and that the Circuit Court erred in dismissing the appeal.

(a) *The Jurisdiction to Review an Appeal from a Three-judge District Court Where the Court Acts without Jurisdiction or Where It Exceeded Its Jurisdiction Is Exclusively in the Circuit Court and Not in the Supreme Court, and the Motion to Dismiss on Jurisdictional Grounds Was Erroneously Sustained.*

The appeal involved the jurisdiction of the three-judge court to determine the issue raised by the intervening petition of the mortgage trustee. It was the contention of the petitioner that the three-judge court was limited in its jurisdiction to the approval of the Adjustment-Plan involving the extension of the maturities and the change of the interest rates but not the construction of the terms of the Trust Indenture nor whether the Trustee should pay over the funds because of other defaults.

The objection being to the *power* of the three-judge court to hear the matter as a court under its limited jurisdiction, the only place where the appeal could have been taken *on the merits* was to the Circuit Court and to no other court. This was squarely decided in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386. There the court said:

> "The three judge procedure is an extraordinary one, imposing a heavy burden on Federal Courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended. * * * When it becomes apparent that the plaintiff has no case for three judges, though they have been properly convened, their action is no longer prescribed and direct appeal here must fail as well as in this case as where the plaintiff does not press his injunction. Smith *v.* Wilson, 273 U. S. 388, 71 L. Ed. 699, 47 S. Ct. 385, supra."

In *Wilenz* v. *Sovereign Camp,* 306 U. S. 573, the court said:

> "The extraordinary procedure before a court of three judges, designed for a specific class of cases sharply defined by the Statute, cannot properly be extended to cases in which there is no substantial basis for relief by injunction restraining the action of the state officers in enforcing or carrying into effect a challenged state statute of general application. * * * As the case was not one for which a court of three judges is prescribed by Section 266 no appeal lies to this court, and it is without jurisdiction to hear the merits of the appeal."

There the court held that the Circuit Court properly exercised the jurisdiction.

The opinion in the instant case, in disposing of this contention, says (R. 23) that these cases are distinguishable on the ground that there it was determined "that there was no occasion for the convening of a three-judge court" while here there is no attack on the convening of the court, and it only involves "some minor matter beyond the jurisdiction". This minor matter involves dividends of $1,694,000 already collected in a period of about one year and dividends to be collected within the next four years, and it is not such a small minor matter. *The jurisdiction was attacked because the court convened as a special court to hear the subject matter of the intervening petition after it had entered its final order approving the Plan and which subject matter was not embraced in the Plan.* An attack of such a jurisdiction comes within the cases decided by this Court that an appeal lies to a Circuit Court of Appeals *on the merits.*

(b) *The Appeal to the United States Circuit Court of Appeals Was Properly Taken from the Three-judge Special Court.*

In *Illinois Bell Telephone Co.* v. *Slattery*, 98 F. (2d) 930, an appeal from a three-judge court was taken to the United States Circuit Court of Appeals for the Seventh Circuit. There, it was urged that the appeal should be dismissed because the exclusive jurisdiction was vested in this Court. In denying the motion to dismiss and in holding that the appeal was properly taken to the Circuit Court of Appeals, the Seventh Circuit discussed the jurisdictional question and arrived at the conclusion *that the appeal from the three-judge court was properly taken* to that court. A further appeal was taken from the final decree in that case (*Illinois Bell Telephone Co.* v. *Slattery*, 102 F. (2d) 58), and it was urged on appeal that the court was without jurisdiction of the appeal. We quote the following from the decision of the court. On page 63 the court says:

> "As to the question of our jurisdiction, it is urged that an appeal from a three-judge statutory court lies only to the Supreme Court of the United States; that the question presented by the appeal involves a construction of the mandate of the Supreme Court, and, therefore, that Court and no other has jurisdiction. Notwithstanding the fact that this jurisdictional question has heretofore had our careful consideration, we have, on account of the importance of the matter, again made a study of the situation presented in this respect and find no reason to change the conclusion heretofore reached. Inasmuch as our reasoning and conclusion is found in Illinois Bell Telephone Company *v.* Slattery, supra, no useful purpose would be served in a further discussion of the question."

An application for a writ of certiorari was denied (307 U. S. p. 648). The opinion in the instant case refers to

these decisions. The opinion is *contrary to these decisions, so that there is a direct conflict between the two Circuits.*

(c) *Section 1245 of Chapter XV Conferring Jurisdiction on the Supreme Court to Review the Final Orders of the Three-judge Court Is Confined to Orders Entered within the Limits of Its Jurisdiction.*

The provision of Section 1245 of Chapter XV conferring the power on the Supreme Court to review final orders of the three-judge court is not any different than the provision in Section 266 which confers the exclusive power of the Supreme Court to hear appeals in such matters. The same reasoning which is applicable to reviews under Section 266 where the attack is on the jurisdiction of the court to hear the matter is applicable to Section 1245 of Chapter XV. That section deals only with reviews from orders entered by the three-judge court *within its jurisdiction* but does not deal with orders where it had no right to act as a court (*Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386).

(d) *Section 1245 of Chapter XV Is an Additional Remedy and Is Not an Exclusive Remedy.*

Section 1245 merely confers jurisdiction on the Supreme Court of the United States to review all final orders under Chapter XV. This is but an additional remedy to the right of appeal under 24 and 25 of the Bankruptcy Act. The application to review by certiorari *is not an absolute right* as the court may in its discretion refuse to review the proceedings while an appeal under 24 and 25 is a vested right.

In 3 *Corpus Juris*, page 340, the author says:

> "A party may sometimes appeal or sue out a writ of error to reverse a judgment, order or decree, although he may also obtain a review of certiorari."

In the absence of a provision in the Statute excluding the right to appeal, the Statute being *remedial*, should be *liberally* construed. While the framers of the Act might have intended to deprive the parties of their *right* to appeal there is nothing in the Act to express such intent.

For the foregoing reasons we urge the issuance of the writs.

Respectfully submitted,

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